IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
Criminal Appeal No.627 of 1999.

1.Laxman Baban Waghe
2.Ramu @ Ramdas Budhya Waghe ..Appellants
(Original accused
Nos.3 & 4)

versus

State of Maharashtra .. Respondent

Ms.Latika Nevrekar, Advocate appointed for the appellants

Mr.P.S.Hingorani, APP for the State

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE : 6th Oct., 2005

Judgment (Per S.B.Mhase, J.):

1. This appeal is directed against the judgment and order dated 15.6.1999 passed by the II Additional Sessions, Judge, Kalyan, in Sessions Case No.229 of 1997, holding the Appellants guilty under sections 302, 201 read with 34 of Indian Penal Code (hereinafter referred to as I.P.C.) and thereby sentenced to suffer Imprisonment for life for the offence punishable under Section 302 read with 34 I.P.C. and further sentenced to suffer simple imprisonment for three years and to pay a fine of Rs.100/- (Rupees One Hundred Only) in

default to suffer simple imprisonment for fifteen days, for the offence punishable under section 201 read with 34 I.P.C.

2. Initially, there were five accused persons against whom the prosecution was launched by the State. However, accused Nos.1, 2 and 5 have been acquitted by the II Additional Sessions Judge, Kalyan. The present appeal has been preferred by Original accused Nos.3 & 4. (For the sake of convenience, they are referred to as accused Nos.3 and 4 respectively)

3. The deceased is Harishchandra Bhoir. He was employed with one Pundalik Mhatre as watchman on the building namely "Aditya Kutir" situated at Anand Nagar, Dombivli. The deceased used to report for his duty at the building everyday from 6.00p.m. to 6.00a.m. of the next day. On 14.3.1997, he reported to his duty at 6 p.m. However, on 15.3.1997 some of the labourers on the site reported to the complainant P.W.1 that four persons, namely two women and two men have beaten Harishchandra- the deceased and have taken him by dragging him. Therefore, P.W.1, the informant went to the site at Anand Nagar and searched around the said building. At about 4.00 p.m. the dead body of Harishchandra was found in a ditch. It was accordingly

reported to the police and thus the First Information report was recorded. Crime No.46/97 was registered under Section 302, 201 r/w.34 I.P.C. An Inquest Panchanama (Exhibit 12) was prepared and the dead body was sent for post-mortem. The post mortem report is at Exhibit 15. P.W.2 is the witness on account of discovery in respect of the wooden rafter (Article 13) and wooden stump (Article 14). There is only one eye witness, P.W.7. Moglayya Papayya. Arrest of the accused was effected on 15.3.1997 by panchanama (Exhibit 29) and at that time clothes of the accused were seized, which were blood-stained. The Chemical Analysis Report is at Exhibit 39. After completion of investigation, the chargesheet was filed. The accused were tried. Out of the five accused, accused nos.1, 2 and 5 have been acquitted and accused Nos.3 and 4 have been convicted. It is to be noted that there is no dispute over the crime that the death of Harishchandra Bhoir is homicidal. Even from the perusal of Exhibit 15, post-mortem report, which is an admitted document, it will be revealed that the cause of death is Criminal cardiac arrest, due to haemorrhage shock due to fracture of chest and laceration of lungs and liver. Thus, from this cause it is revealed that the death is due to the injuries as noticed in column No.17 of the post-mortem report. The post-mortem report shows that

there were injuries on the right cheek, CLW 1 x1 inch, Right back scratch marks Occipul, 1 inch-transverse. From column No.18 it is revealed that the chest wall was fractured and the right shoulder was dislocated. From column No.19 it is revealed that there was injury under the scalp 1 inch transverse and 1x1 inch deep, there was fracture on Occipul region. On examination of thorax, it was found that there was right fracture of 2nd ribs- downwards, Pleura Left side lower 5 total ribs parallel. It was equally found that the left scapula was fractured. The internal wounds were also found to be co-related with the external wounds. Taking into consideration all these material, coupled with the inquest panchanama, it is conclusively proved that the death of the deceased was a homicidal death.

4. The question is as to who is responsible for the death. In order to bring home the guilt of the accused, prosecution has examined in all 8 witnesses. Out of the eight witnesses, Prosecution Witness Nos.3, 4 and 5, who were working as labourers along with deceased Harishchandra at the site, have been declared hostile by the prosecution, as they have not supported the prosecution. There is only one eye witness, Moglayya Pappayya (P.W.No.7), who was also a labourer working with the deceased at the said site at Anand

Nagar. The other evidence is by way of discovery under Section 27 of the Evidence Act. In order to prove those discoveries, Pawan Mhatre (P.W.2) has been examined. Further, there is corroborative evidence of the Chemical Analyser.

5. From the complaint, (Exhibit 17), it will be revealed that the complainant is mother of the deceased. However, she is not having any personal knowledge about the incident. She has reported to the police that on 15.3.1997 at about 6.00 , the labourers working at the site of Anand Nagar came to her and reported that four persons have beaten her son and have taken him by dragging. Out of the four assailants, two were female and two were male. Thereafter, she searched for her son and his body was found at 4.00 p.m. Thereafter she lodged the report. In order to support this, P.W.7, Moglayya Pappaya has been examined. He deposed that the working hours of deceased Harishchandra were 6.00p.m. to 6.00a.m and that accused Nos.1 to 4 were residing below the Tamarind tree at the site. He has further deposed that the accused were dealing in the business of scrap material. He has deposed that, on the relevant day deceased Harishchandra had physically assaulted accused No.1 and one lady accused and had asked them not to

stay at the site. At the dawn of 15.3.1997, he heard some noise and he woke up. When he came out of the house, he saw that accused Nos.3 to 5 were assaulting the watchman Harishchandra. Accused Nos.3 and 4 were armed with wooden stick, whereas accused No.5 was assaulting the watchman with stone. Then the aforesaid three persons and two others pulled down the compound wall and dragged the deceased towards the water tank. Hence he ran towards the village and informed the fact to Dashrath Mhatre and to the mother of Harishchandra. He further stated that he searched for the dead body alongwith the mother of deceased and the dead body was found at about 4.00 p.m. From his cross-examination it is revealed that apart from P.W.7 there were other labourers namely Gangayya, Narsimalu and Sarangi, who have witnessed the incident. He has further admitted that before going to the house of the mother of Harishchandra, he was knowing the names of the accused. He stated that he disclosed the names of the accused to the mother of Harishchandra and denied the suggestion that the accused persons were not known to him. He has accepted further in his cross-examination that he knew the names of the accused Nos.3 to 5, but he was not in position to point out every accused with his name. If we read the testimony of this witness along with the testimony of the complainant P.W.1, it will be revealed

that had this witness reported that the accused persons were residing under the tamarind tree and they were known to him, the said fact would have reflected in the First Information Report and the same would have further disclosed the names of the accused, since this P.W.No.7 claims that the names of the accused were reported to P.W.1. However, the absence of this information in the First Information Report and in the testimony of P.W.1 leads us to draw inference that at the time when P.W.7 reported the incident to P.W.1, he must not be knowing the names of the persons who were the assailants of Harishchandra, and therefore, he has reported that out of the four assailants two were male persons and two were female persons. This conclusion is further supported from the admission given by this witness, when he was asked in the Court to identify the persons by the names and he deposed that 'though he knows the names of the accused nos.3 to 5, he is not in a position to identify them'. Thus, the inference follows that the names must have been tutored to this witness. Otherwise, this witness could have identified each of the accused by name, because according to him, these persons were residing below the Tamarind tree within the vicinity of Aditya Kutir which was under construction and where the deceased along with the witness was employed as a labourer. Thus, taking into

consideration this discrepancy, we find that under the facts and circumstances of the case, it was necessary for the Investigating Officer to hold an identification parade. In the absence of the identification parade being conducted by the Investigating Agency, it will be very difficult for us to infer that accused Nos.3 and 4 were identified by P.W.7. as the assailants on 15.3.1997 and that they are responsible for the death of Harishchandra. We find that the uncorroborated testimony of P.W.7 is insufficient to inspire confidence to accept it and to pass conviction on such an isolated testimony of the witness.

6. There is evidence brought on record by way of discovery and in order to prove this discovery, Baban Mhatre (P.W.2) has been examined. It appears from his evidence that on 17.3.1997 accused No.4 initially showed willingness to produced the wooden rafter which was used in the crime and accordingly the memorandum of panchanama (Exhibit.19) was prepared. Thereafter, discovery panchanama (Exhibit 20) was prepared. Since the accused No.4 had taken the police and the panchas to the ditch situated behind J.M.Nagar, which is the place adjacent to Anand Nagar, where the building Aditya Kutir was under construction, and from which ditch a wooden rafter was produced. It is further to

be noted that after preparing the panchanama, the police and the panchas returned to the Police Station, and accused no.3 showed willingness to produce the wooden stump used in the said crime, and therefore, memorandum (Exhibit 21) was prepared at the instance of the accused. The police and the panchas went to the site of Aditya Kutir at Anand Nagar, Thane and from the said spot, where number of Bamboo sticks and wooden planks were kept, one of the wooden stump was produced by the accused and the panchanama (Exhibit 22) was prepared in this respect. From the cross examination of this witness, it is revealed that the place from where the wooden rafter (Article 13) was recovered is the same ditch from where the dead body was found, as is reflected from the inquest panchamama (Exhibit 12) and the spot panchanama (Exhibit 13). Even P.W.8. the Investigating Officer has also accepted that the place of discovery of the wooden rafter (as per Exhibit 20 panchanama), and the dead body is one and the same. Therefore, it becomes clear that if the said place was only searched by the police, which is an open ditch, where the dead body was found, equally the wooden rafter would have been found when panchanama has been prepared. P.W.2 has stated that before going to the police station, the panchanama was prepared at the spot and the same was signed at the police station. In his

cross examination he has admitted that after recovery of the rafter, they all came back to Anand Naar where Government jeep was parked and the panchanama was written on the said spot by taking assistance of the bonnet of the jeep. He further states that it was not signed at the said spot, but it was signed at the police station after they returned back to the police station. We find that it was obligatory for the Investigating Agency to prepare the panchanama on the spot where discovery of the rafter was made and also to obtain the signatures at the spot. After reading the evidence the inference follows that both the memorandum panchanama and the discovery panchanama have been prepared and signed at the police station itself, and this creates a serious doubt about the discovery. Even though the witness has denied that all the four documents were prepared in the police station, but when it is found that a part of the record is not trustworthy, it will be difficult to accept the rest of the record to be trustworthy. When we find that after accused No.4 made a statement for showing the spot and immediately after returning on preparing panchanama, accused No.3 has made statement coupled with the other infirmities which we have pointed out, the act of preparing panchanama with the aid of Section 25 is artificial and an attempt is made by the Prosecution to

force the act on the accused. We disbelieve the memorandum panchamamas (Exhibit 19 to 22). Thus, if the evidence of P.W.7 and P.W.2 is disbelieved, there is nothing on record which can pass criminal liability of Sections 302 & 201 of I.P.C. on the accused persons.

7. In the result, we feel that the prosecution has miserably failed to prove the guilt of the accused, and we pass the following order.

ORDER

1. The Appeal is allowed.

2. The Order of conviction and sentence passed against the Accused Nos.3 & 4 for the offence punishable under Section 302, 201 r/w. 34 of I.P.C. is hereby set aside.

3. The Appellants, Original accused No.3 and 4 are acquitted of the offences punishable under section 302, 201 r/w. 34 of I.P.C.

4. The amount of fine, if deposited be returned to the respective accused after the period of appeal is over and in case of appeal subject to its decision.

5. The accused be set at liberty forthwith, if not required in any other case.

6. Ms. Latika Nevrekar, who was appointed for conducting the matter on behalf of accused Nos.3 & 4. has rendered valuable service in conducting this matter. We quantify her fees at Rs.1000/- (Rupees One Thousand Only)

(S.R.SATHE, J.) (S.B.MHASE,J.)

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CORAM: S.B.MHASE &

S.R.SATHE, JJ.

DATE : 6th Oct., 2005

Final Order:

For the reasons recorded seperately the Court passes the following order.

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(S.R.SATHE, J.) (S.B.MHASE,J.)